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FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of:) MM DOCKET No.: WT 94-147
JAMES A. KAY, JR.)
License of One Hundred Fifty-)
Two Part 90 Licenses in the)
Los Angeles, California Area)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Los Angeles, California Area)

Suite 201
FCC Building
2000 L Street, N.W.
Washington, D.C.

Monday,
November 16, 1998

The parties met, pursuant to the notice of the Judge.

BEFORE: HON. JOSEPH CHACHKIN
Administrative Law Judge

APPEARANCES:

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1 P R O C E E D I N G S

2 JUDGE CHACHKIN: As I indicated in my order, the
3 purpose of this session is to establish a hearing schedule
4 for the prompt resolution of this case. May I have the
5 appearance on behalf of the parties? On behalf of Kay?

6 MR. SHAINIS: Aaron Shainis and Robert Keller.

7 JUDGE CHACHKIN: And on behalf of the Wireless
8 Telecommunications Bureau?

9 MR. SCHAUBLE: Good morning, Your Honor. John J.
10 Schauble, and also entering an appearance for William H.
11 Knowles-Kellett, who I expect to be here shortly.

12 JUDGE CHACHKIN: All right. Now first of all,
13 before we get to establishing the schedule, I am in receipt
14 of various letters, communications, I don't know if I was
15 supposed to get them or not. But apparently, from the
16 contents, apparently the parties believe they want to raise
17 some, file motions, or my to reexamine some previous rulings
18 of the previous Judge. Let me state at the outset that the
19 only thing I'd be interested in considering is something
20 that relates to evidentiary matters involving the hearing
21 itself.

22 Anything involving discover, as far as I'm
23 concerned, we're past that. The Bureau has now exchanged
24 its exhibits, they've announced their witnesses, so there's
25 no reason, as I could see, to revisit any past ruling

1 involving discovery.

2 Now, I don't know if, I can't believe it, since
3 the Judge has not, the previous Judge did not have an
4 admissions session, that any rulings were made with respect
5 to the trial of the issues. But let me state at the outset
6 that it's my, how we're going proceed. The Bureau will put
7 in their entire case before Kay is required to put on their
8 case. And if that means trying the case in Washington, or
9 in California, it's still going to be that the Bureau is
10 going to put in their entire case.

11 As far as the admissions session is concerned,
12 only the Bureau's exhibits will be marked for identification
13 offering evidence and rulings made on it. I will not
14 require Kay to have any of their exhibits... I know they've
15 exchanged exhibits, but I'm not going to require them to
16 have them identified, since the burden in the proceeding of
17 proof is on the Bureau in this proceeding.

18 Now, the first question is, are there any
19 preliminary matters the parties want to take up before we
20 talk about establishing a schedule?

21 MR. SCHAUBLE: Your Honor, I do have one matter in
22 terms of a question. And this may come up in terms of our
23 discussion of a procedural schedule. When it comes time for
24 Mr. Kay to present his case, do you anticipate having a
25 separate admissions session for Mr. Kay's exhibits? Or do

1 you anticipate, just, Mr. Kay will put in his exhibits as
2 his witnesses...

3 JUDGE CHACHKIN: Well, it depends on how Kay wants
4 to proceed. If Kay wants to have an admissions session with
5 exhibits, and more likely, however, Kay will, when they put
6 on their witnesses, will introduce their exhibits with their
7 witnesses. I don't know what your intention is, Mr.
8 Shainis. But, that's what I presume you're going to do.

9 MR. SHAINIS: Your Honor, I...

10 JUDGE CHACHKIN: Instead of having an admissions
11 session, you would just offer your exhibits through your
12 witnesses.

13 MR. SHAINIS: To the extent that there is a
14 sponsoring witness, to the extent that there is a matter for
15 notice to be taken of...

16 JUDGE CHACHKIN: Well, then you could introduce
17 it.

18 MR. SHAINIS: Then we would, but, yes, that is how
19 we intend to proceed.

20 JUDGE CHACHKIN: All right. Anything else the
21 parties want to take up as far as preliminary matters are
22 concerned?

23 MR. SCHAUBLE: I have nothing further, Your Honor.

24 JUDGE CHACHKIN: Mr. Shainis, are there any
25 matters you want to take up?

1 MR. SHAINIS: Your Honor, just as a preliminary
2 matter... and this is more of a procedural matter. When we
3 exchange items with the Bureau, we've been serving both Mr.
4 Schauble and Mr. Knowles-Kellett. We'd like to be required
5 only to serve one or the other. And I don't have any
6 problem just serving Mr. Schauble if that's what he would
7 prefer. And likewise, they don't have to serve both Mr.
8 Keller and me, one or the other will be sufficient.

9 JUDGE CHACHKIN: Is that all right with you, Mr.
10 Schauble?

11 MR. SCHAUBLE: Your Honor, we would prefer that,
12 we've served both Mr. Shainis and Mr. Keller. Mr. Knowles-
13 Kellett is in Gettysburg. He's an integral part of the team
14 in this case, and especially with burdensome, you know, with
15 long filings can be burdensome for us to fax up documents.
16 We would prefer that we proceed as we have previously, that
17 we have service upon both counsel. And obviously we would
18 continue to serve both Mr. Shainis and Mr. Keller with
19 copies of any filings in this case.

20 JUDGE CHACHKIN: Do you have any further response,
21 Mr. Shainis?

22 MR. SHAINIS: Well, Your Honor...

23 JUDGE CHACHKIN: What is the burden of you serving
24 both of them? And having both of you served, also? For
25 your convenience.

1 MR. SHAINIS: There was one particular submission,
2 Your Honor, that Mr. Schauble requested, that he only served
3 me. I believe it was the initial exhibit exchange that you
4 made, you only wanted to give me the documents, not,
5 because of the logistic problems, getting them to Mr.
6 Keller. Well, we have the same logistical problem, but
7 we've managed to do it. All I'm saying is that it seems to
8 me that it makes it easier just to serve one or the other.
9 I mean, in the normal...

10 JUDGE CHACHKIN: Let me put it this way. Let me
11 put it this way. As far as exchange of exhibits is
12 concerned, I will only require one copy to be served on you,
13 and one copy to the other party. As far as other pleadings
14 are concerned, I don't see any problem with serving both of
15 them.

16 MR. SHAINIS: Fine.

17 JUDGE CHACHKIN: I think the exhibits is what
18 we're talking about as the main problem, I guess. The mass
19 of documents. So apparently, in any event, you've served
20 copies already of...

21 MR. SCHAUBLE: Your Honor, we did provide multiple
22 copies of the exhibits. I thought we had an arrangement
23 that, we delivered all the copies of our exhibits to Mr.
24 Shainis's office, but...

25 JUDGE CHACHKIN: Well... go ahead, I'm sorry.

1 MR. SCHAUBLE: Just for clarification, Your Honor.

2 JUDGE CHACHKIN: But apparently, Mr. Shainis has
3 now exchanged copies of his proposed exhibits with you.

4 MR. SCHAUBLE: That's correct, Your Honor.

5 JUDGE CHACHKIN: In the future, any further
6 exhibits, like for instance at the hearing, if he intends to
7 put in exhibits, it's not necessary for him to serve two
8 copies, one on you and one on your co-counsel. One copy
9 will suffice.

10 MR. SCHAUBLE: That's fine, Your Honor.

11 MR. SHAINIS: Your Honor, the other thing is, on
12 hand delivery, we'd like to be able to hand deliver just to
13 one. And we'd be happy to serve by regular service to the
14 other counsel. But if hand delivery is, served to be hand
15 delivery to all.

16 JUDGE CHACHKIN: What are we talking about now?

17 MR. SHAINIS: Such as a pleading.

18 JUDGE CHACHKIN: I don't anticipate there will be
19 any more pleadings...

20 MR. SCHAUBLE: I don't anticipate...

21 JUDGE CHACHKIN: ...except for post findings.

22 MR. SHAINIS: I don't anticipate any pleadings
23 either, Your Honor, but should there be, I would like to
24 have that ruling. That does not cause, it does not cause
25 any type of disadvantage...

1 JUDGE CHACHKIN: As long as you send a copy to the
2 other party, I'll permit you hand deliver just one party.

3 MR. SHAINIS: Thank you, Your Honor.

4 JUDGE CHACHKIN: And you can designate who you
5 want a hand delivery, too.

6 MR. SCHAUBLE: Your Honor, I would be the hand
7 delivery, and would I assume correctly that part, that Mr.
8 Shainis would be the hand delivering party for...

9 MR. SHAINIS: Either one of us.

10 JUDGE CHACHKIN: Well, let's designate one now so
11 that we don't have a problem. Mr. Shainis will be the party
12 you'll hand deliver to.

13 MR. SCHAUBLE: OK.

14 JUDGE CHACHKIN: And serve the other party by
15 mail.

16 MR. SCHAUBLE: OK.

17 JUDGE CHACHKIN: All right. That didn't cause too
18 much controversy. What else?

19 MR. SHAINIS: We're easy to get along with, Your
20 Honor.

21 JUDGE CHACHKIN: That's wonderful. Anything else
22 the parties want to raise at this time before we talk about
23 dates?

24 MR. SCHAUBLE: I have no further preliminary
25 matters, Your Honor.

1 JUDGE CHACHKIN: Let me raise this general
2 question. Why are we not trying this entire case in
3 Washington, DC?

4 MR. SHAINIS: If I can respond to that, Your
5 Honor. On behalf of Mr. Kay...

6 JUDGE CHACHKIN: Well, let's hear from... oh, you
7 can go first, Mr. Shainis.

8 MR. SHAINIS: On behalf of Mr. Kay, Your Honor, we
9 would be amenable to trying the entire case in Washington,
10 DC.

11 JUDGE CHACHKIN: And what's your position, Mr.
12 Schauble?

13 MR. SCHAUBLE: Your Honor, the Bureau believes the
14 majority of the case could be tried in Washington, DC.

15 JUDGE CHACHKIN: Well, why not the entire case?

16 MR. SCHAUBLE: Your Honor, there are four
17 witnesses in this case who are former employees of Mr. Kay
18 who, I would say are neither friendly to Mr. Kay nor
19 friendly to the Bureau.

20 JUDGE CHACHKIN: So you serve them with a
21 subpoena. It seems to me, in terms of cost, it would be
22 much cheaper to bring those four witnesses to Washington
23 than all of us to go out to California for four witnesses,
24 which may take no more than a day or two. That doesn't make
25 sense. And you know the Commission right now is having

1 difficulty with finance, you know, with money problems.

2 And, if we're talking about just four witnesses, let's bring
3 them to Washington. I'll be glad to serve a subpoena, to
4 sign a subpoena.

5 MR. SCHAUBLE: Your Honor, I think the Bureau also
6 has to take into consideration, you know, the burden on
7 these individuals of, you know, disrupting their lives,
8 and...

9 JUDGE CHACHKIN: Well, what about the burden on us
10 going out to California? And the costs involved? Which
11 would be cheaper? That's what I'm concerned about. What is
12 cheaper for the government, to bring the four witnesses
13 here, or for all of us to go out to California and spend the
14 week in California?

15 MR. SCHAUBLE: Your Honor, I haven't seen what the
16 airfare is, I mean, there would be more airfare in terms of
17 flying people out, but obviously there would be the per
18 diem. I haven't...

19 JUDGE CHACHKIN: If we're only talking about four
20 witnesses, it's my view the case should be, the entire case
21 should be tried in Washington.

22 MR. SCHAUBLE: The other thing I wish to bring up,
23 Your Honor, is that there was one point at which one
24 potential witness, Mr. Mark Sobel, who Mr. Keller
25 represents, who objected to being directed to testify in

1 Washington as opposed to Los Angeles.

2 JUDGE CHACHKIN: Well, if we serve a subpoena,
3 he'll come to Washington.

4 MR. KELLER: And Your Honor, just to make the
5 record clear, that was at a time when there were already
6 established separate hearing dates, both in Washington and
7 Los Angeles, hearing room already reserved, and our point at
8 that time was, since there's going to be a session in Los
9 Angeles anyway, why is a non-party being dragged all the way
10 across the country. But if we have all the sessions
11 scheduled in Washington, that issue would not be present.

12 JUDGE CHACHKIN: All right, I think we'll try the
13 entire case in Washington, Mr. Schauble.

14 MR. SCHAUBLE: Very well, Your Honor.

15 JUDGE CHACHKIN: And you just get me subpoenas,
16 I'll sign them.

17 MR. SCHAUBLE: OK.

18 JUDGE CHACHKIN: How soon are you prepared to put
19 in your, to have an admissions session?

20 MR. SCHAUBLE: Your Honor, we could probably have,
21 depending on Your Honor's schedule, we could probably have
22 an admissions session, the admissions session, after
23 Thanksgiving.

24 JUDGE CHACHKIN: You mean, like November 30th?
25 Monday, November 30th?

1 MR. SCHAUBLE: Actually, Your Honor, probably...
2 I'm on leave a couple days that week, so probably the
3 following week would be...

4 JUDGE CHACHKIN: The following week is December.
5 We're moving in December. That's not going to work for us
6 the following week.

7 MR. SCHAUBLE: OK. I take it you mean that Your
8 Honor's move has been rescheduled? The word we had was
9 November 19th for the Judges' move.

10 JUDGE CHACHKIN: No. It was always December 3rd.

11 MR. SCHAUBLE: OK.

12 JUDGE CHACHKIN: You're going to be on... when are
13 you going to be on leave, you're saying?

14 MR. SCHAUBLE: Wednesday and Thursday.

15 JUDGE CHACHKIN: Oh.

16 MR. SCHAUBLE: If you need me to be here, Your
17 Honor, I can.

18 JUDGE CHACHKIN: No, wait a minute, it's going to
19 take more than two days? Monday and Tuesday?

20 MR. SCHAUBLE: Your Honor, I think it might. The
21 Bureau has over 350 exhibits...

22 JUDGE CHACHKIN: Yeah, but most of them deal with
23 loading, and most of them are material which was given to
24 you by Kay. I assume there's not going to be any dispute
25 about that. As far as the loading data is concerned, which

1 consists of most of your exhibits...

2 MR. SCHAUBLE: Your Honor...

3 JUDGE CHACHKIN: I don't know what they prove, I
4 mean, I haven't seen any analysis of them, but as far as the
5 raw material is concerned, which is the exhibits themselves,
6 I assume that since Kay supplied you with the data, he's not
7 going to object to their admission.

8 MR. SCHAUBLE: Your Honor, we've heard informally
9 that Mr. Kay might have quite a number of objections to our
10 exhibits.

11 JUDGE CHACHKIN: To the loading material?

12 MR. SCHAUBLE: Which may take some time to
13 resolve.

14 JUDGE CHACHKIN: All right...

15 MR. SCHAUBLE: I'm going to... if the 30th works
16 for Your Honor, we can work around that.

17 JUDGE CHACHKIN: All right. Let's have the
18 admissions session November 30th. And when will you be
19 prepared to start with your witnesses? My plan is we'll
20 recess for the week of Christmas and New Year's, that one
21 week.

22 MR. SCHAUBLE: OK.

23 MR. SHAINIS: Your Honor, I didn't hear that
24 last...

25 JUDGE CHACHKIN: I said we'll recess for the

1 Christmas week.

2 MR. SHAINIS: OK.

3 JUDGE CHACHKIN: Christmas is on a Friday,
4 December 25th, until the following, until after New Year's,
5 unless the parties want to go on hearing during that period,
6 I'm willing to, also. But, if the parties want that week
7 off, we'll take that week off.

8 MR. SCHAUBLE: Your Honor, we're prepared to move
9 quickly. The Bureau will need some time in order to
10 prepare, and get subpoenas, and serve subpoenas upon the
11 parties. Perhaps, Your Honor, what we could do is, perhaps
12 the week of the 13th of December, start...

13 JUDGE CHACHKIN: All right. Start the hearing
14 December 14th.

15 MR. SHAINIS: Your Honor, I am going to be out of
16 town for most of that week.

17 JUDGE CHACHKIN: When will you be back?

18 MR. SHAINIS: I will be back, if I, let me look at
19 the calendar real quick. December, is December 17th a
20 Thursday?

21 JUDGE CHACHKIN: December 17th is a Thursday, yes.

22 MR. SHAINIS: All right, I'll be coming back, I'll
23 be flying back on the 18th.

24 JUDGE CHACHKIN: I see. Well, what I'm willing to
25 do is, what I'm willing to do is to start the hearing

1 immediately after the New Year's, and complete the hearing,
2 run the hearing, finish it in January. Is that all right
3 with your schedule? Mr. Shainis?

4 MR. SHAINIS: Your Honor, the problem that I have
5 been advised by Mr. Keller, is Mr. Keller, he can better
6 express it than I can, has a trial scheduled in
7 Pennsylvania.

8 JUDGE CHACHKIN: When?

9 MR. KELLER: Yes, I sent out a letter on that. I
10 don't know if you received it.

11 JUDGE CHACHKIN: I received something.

12 MR. KELLER: OK. So, the trial itself is
13 scheduled to begin on February the 15th, and then there's
14 all the attending procedural dates backing up from that,
15 including the exchanging of pretrial memorandum, which I
16 think is the equivalent of our exchange of exhibits...

17 JUDGE CHACHKIN: When is that scheduled?

18 MR. KELLER: That's scheduled for January 26th.
19 February the 5th are the two parties jury instructions. All
20 through the early part of February. But then backing up
21 from that there's also dispositive, I'm expecting a
22 dispositive motions deadline on December the 15th. I know
23 we're going to be seeing motions to dismiss, motions for
24 summary judgment; they are going to have to be dealt with
25 during that time frame. So, I really anticipate the month

1 of January is going to be pretty tied up with pretrial
2 matters in that case.

3 JUDGE CHACHKIN: And then the February month is
4 going to be tied up with the trial itself.

5 MR. KELLER: Pardon me?

6 JUDGE CHACHKIN: Then you're going to have
7 February tied up with the trial itself.

8 MR. KELLER: Yes, well, I expect the trial
9 probably should take no more than a week or so, if it goes.

10 JUDGE CHACHKIN: But that eliminates January and
11 February. Well, we're not going to... there's no reason
12 that we wait that long. If we start early in January, I
13 hope that the hearing could be over in two weeks. And if
14 it's over in two weeks, this would be the least impact on
15 this schedule.

16 MR. KELLER: What I'm thinking more of, Your
17 Honor, is how quickly we're going to begin with Kay's case
18 after that hearing. If their hearing starts in January,
19 then they're probably going to be concluding right at the
20 time I'm in the thick of this other...

21 JUDGE CHACHKIN: Well, let's find out. How long
22 to you think your case is going to be?

23 MR. SCHAUBLE: Your Honor, a lot of it is
24 dependent upon how much cross examination...

25 JUDGE CHACHKIN: Well, let's look at your direct

1 case. How long do you think your direct case is going to
2 take?

3 MR. SCHAUBLE: Your Honor...

4 JUDGE CHACHKIN: How many witnesses do you have in
5 mind?

6 MR. SCHAUBLE: I believe we have ten, Your Honor.

7 JUDGE CHACHKIN: Ten witnesses.

8 MR. SCHAUBLE: The longest of which is going to be
9 Mr. Kay. And the Bureau anticipates that its direct
10 examination of Mr. Kay is probably going to take three days.

11 JUDGE CHACHKIN: That long?

12 MR. SCHAUBLE: Yes, indeed. And...

13 JUDGE CHACHKIN: Well, let's look at your
14 schedule, Mr. Shainis. You're going to be gone what period
15 of time now are we talking about?

16 MR. SHAINIS: I'm leaving on that week, December,
17 on Tuesday morning, Your Honor, which I think is December
18 14th.

19 JUDGE CHACHKIN: No, Tuesday morning is the 17th
20 and the 10th.

21 MR. SHAINIS: I'm sorry. Hold it. I'm leaving
22 Tuesday morning the 15th, and coming back on the 18th.

23 JUDGE CHACHKIN: That's Sunday is the 15th. No,
24 wait a minute, I'm sorry.

25 MR. SHAINIS: Of December.

1 JUDGE CHACHKIN: I'm sorry, I'm sorry. Oh, you're
2 leaving the 15th and coming back the 18th, OK.

3 MR. SHAINIS: Right.

4 JUDGE CHACHKIN: All right.

5 MR. SCHAUBLE: Your Honor, if I may just note the
6 presence of Mr. William Knowles-Kellett.

7 JUDGE CHACHKIN: All right.

8 MR. KNOWLES-KELLETT: Excuse the interruption.

9 JUDGE CHACHKIN: Your appearance is noted. Well,
10 maybe we won't skip Christmas week; maybe we'll just skip
11 Christmas Day and New Year's Day and start on the 21st of
12 December.

13 MR. KNOWLES-KELLETT: I have a vacation, Your
14 Honor, planned since mid-summer, from the 28th of December
15 to the 8th of January. I can miss it if we have to, Your
16 Honor, but it's non-refundable tickets for my wife and I.

17 JUDGE CHACHKIN: It's the 8th, and when did you
18 say? The 28th to the 8th?

19 MR. KNOWLES-KELLETT: The 28th of December to the
20 8th of January. But, I realize that there's more important
21 conflicts going on at the end of the month. It's actually,
22 excuse me, Your Honor, it's the 30th of December to the 8th
23 of January.

24 JUDGE CHACHKIN: Oh, the 30th, OK. All right,
25 then, what we will do, then, what we will do is start on

1 December 21st. I'm just putting forth this. Start on
2 December 21st, run those four days. The four days of the
3 next week, which hopefully will conclude the Bureau's case,
4 those eight days. And resume on January 4th, if the
5 Bureau's case is not concluded, and then start with the
6 Kay's case.

7 MR. SHAINIS: Your Honor, you're not envisioning
8 any break between the conclusion of the Bureau's case and
9 the commencement of Kay's case?

10 JUDGE CHACHKIN: Correct. I see no reason for it.
11 I'm not aware of any precedent where the Commission has ever
12 allowed a break.

13 MR. SHAINIS: Well...

14 JUDGE CHACHKIN: Nor do I see the need for it. I
15 don't think the issues are that complicated, and you right
16 now know what the Bureau's case consists of. You've got
17 their exhibits, you have their list of witnesses... why
18 would there be a need for a break?

19 MR. SHAINIS: First of all, I know what the Bureau
20 is proposing as exhibits. I don't know what is going to be
21 admitted and what is not going to be admitted of the
22 Bureau's exhibits.

23 JUDGE CHACHKIN: Well, if it's not admitted, then
24 you're even in a better position, because you know exactly
25 what the Bureau is going to offer. You know all their

1 exhibits, so there's no surprise there. And basically you
2 know what their witnesses are going to testify to. I assume
3 you've deposed most of them.

4 MR. SHAINIS: In one way or the other that is
5 correct, Your Honor.

6 JUDGE CHACHKIN: So why do we need a break?

7 MR. SHAINIS: Well, I... my sense is, Your Honor,
8 that, and I'm not talking about a terribly long break, that
9 it would be more efficient. Even if I get same day
10 transcripts, I still need time to go over them, and to
11 decide what we're going to put in and what we're not going
12 to put in. I just think it would be more efficient to have
13 a break but if, obviously, we'll defer to your ruling.

14 JUDGE CHACHKIN: All right. Well, we will start
15 the hearing on December 21st, and as I indicated, run it for
16 four days. We'll take off for Christmas day, and start
17 again on December 28th and run it for four days, until the
18 31st, and take off for New Year's day.

19 MR. SCHAUBLE: Your Honor, one additional... on
20 the... at this point I have plane tickets to go home to my
21 parents on... I think at like 3 p.m. on the afternoon of the
22 24th. Would Your Honor be amenable to breaking early on
23 the...

24 JUDGE CHACHKIN: I would be amenable. And in
25 terms of Mr., you said you're going to be gone until the

1 8th, you said?

2 MR. KNOWLES-KELLETT: Not under this schedule,
3 Your Honor. I'd be gone, your case is called to be on just
4 straight when I... I'd be the end of December to the 8th of
5 January.

6 JUDGE CHACHKIN: Well, let's see. Maybe we'll
7 accommodate you and give the break that Mr. Shainis wants.
8 Give him a little break. If we start the... you're going to
9 return when, the 8th?

10 MR. KNOWLES-KELLETT: The 8th.

11 JUDGE CHACHKIN: Well, Mr. Shainis will have a
12 week or two break, then, if the Bureau concludes on the
13 31st.

14 MR. KNOWLES-KELLETT: I would greatly appreciate
15 that, Your Honor.

16 JUDGE CHACHKIN: All right, then, we will resume
17 on January... let's see.

18 MR. KELLER: January the 8th is a Monday, I
19 believe.

20 MR. KNOWLES-KELLETT: January the 8th is a Friday.

21 JUDGE CHACHKIN: January the 8th is a Friday? All
22 right, then we'll start January 11th. Resume wherever we
23 are. Presumably the Bureau will be finished with their
24 case, so Mr. Shainis you'll have almost a two-week break.

25 MR. SHAINIS: Yes, Your Honor, and if the Bureau

1 is not finished with their case, the hearing will just
2 resume on January 11th.

3 JUDGE CHACHKIN: Yeah. That's right. If you
4 haven't finished your case, we'll resume on January 11th.
5 And then we'll continue.

6 MR. SCHAUBLE: Understood, Your Honor.

7 MR. KNOWLES-KELLETT: Thank you, Your Honor.

8 JUDGE CHACHKIN: That should accommodate
9 everybody.

10 MR. SHAINIS: Well, not Mr. Keller, but...

11 JUDGE CHACHKIN: Well, we'll try to finish as
12 early as we can so Mr. Keller will be able to go on with his
13 business and hopefully it won't take too long. Do you have
14 any idea how long your case is going to take?

15 MR. SHAINIS: Your Honor, quite honestly, no. I
16 was assuming a day-and-a-half of cross examination for each
17 day that the Bureau has a witness on.

18 JUDGE CHACHKIN: For every witness?

19 MR. SHAINIS: Well, I would assume so.

20 JUDGE CHACHKIN: OK. Well, we'll just see what
21 the Bureau, what happens.

22 MR. SHAINIS: Well, one of the few things that the
23 Bureau and we agreed upon is we want a full and complete
24 record.

25 JUDGE CHACHKIN: I understand that. But we don't

1 know, well, we'll see what Bureau counsel, what the
2 witnesses testify, well, we'll do the best we can. We'll do
3 the best we can.

4 All right, so we will start it on December 21st.
5 First of all, November 30th we'll have an admissions
6 session. The hearing will begin on December 21st and run to
7 the 24th, and we will recess at 3:00 p.m., is it?

8 MR. SCHAUBLE: My flight leaves at 3:00 p.m., Your
9 Honor, so --

10 JUDGE CHACHKIN: So, we'll want to leave at...

11 MR. SCHAUBLE: Probably 1:00.

12 JUDGE CHACHKIN: All right, well, we'll just skip
13 lunch and we'll run from 9:00 to 1:00 that day, the 24th.
14 All the hearing days will start at 9:00 a.m. and will run
15 until 4:00 or 5:00, depending on where we are with the
16 witnesses. And January 11th we'll resume again at 9:00
17 a.m., wherever we are.

18 MR. KELLER: Excuse me, Your Honor, did you have
19 the 28th through the 30th in there, as well, or did we drop
20 that?

21 JUDGE CHACHKIN: No, 21st to 24th, 28th to 31st.
22 We're not going to meet on Christmas and New Year's Day.
23 Anything else the parties want to raise at this time?

24 MR. SCHAUBLE: We have nothing further, Your
25 Honor.

1 JUDGE CHACHKIN: Mr. Shainis, anything you want to
2 raise?

3 MR. SHAINIS: Your Honor, to the extent that Mr.
4 Kay needs to subpoena witnesses...

5 JUDGE CHACHKIN: Yes.

6 MR. SHAINIS: There is a, I think it's in the
7 rules, a 20-day notification period for...

8 JUDGE CHACHKIN: Not for hearings. That's for
9 depositions.

10 MR. SHAINIS: OK.

11 JUDGE CHACHKIN: You can subpoena a witness today
12 and serve him tomorrow. A hearing is different than
13 discovery.

14 MR. SHAINIS: OK, I thought you had to give a 20-
15 day notification period for, before they had to appear, to
16 give them the opportunity to...

17 JUDGE CHACHKIN: No, that's discovery.

18 MR. SHAINIS: OK. All right.

19 JUDGE CHACHKIN: Unless someone has the rules, and
20 can show me differently.

21 MR. SHAINIS: No, no. I don't... I was just going
22 from memory.

23 JUDGE CHACHKIN: You don't.

24 MR. SHAINIS: My point was, since I don't, I would
25 like to give the, our witnesses, as much time as possible, I

1 don't know the dates, so you know, I guess the subpoenas
2 should say, "date to be determined."

3 JUDGE CHACHKIN: Well, you could put down January
4 11th, because I will not require you to start your case
5 until January 11th.

6 MR. SHAINIS: OK.

7 JUDGE CHACHKIN: If the Bureau finishes earlier,
8 then Kay will have that little advantage and start on
9 January 11th. If the Bureau is still going, we work on
10 January 11th.

11 MR. SCHAUBLE: And obviously, Your Honor, we'll
12 work with counsel for Kay as best we can to give estimates
13 as to where we are and how much longer we think things might
14 go.

15 JUDGE CHACHKIN: And I will rule if questions are
16 raised concerning relevance, and we'll see where we go from
17 there. But in any event, the first order of business is the
18 admissions session which will begin at 9:00 a.m. on November
19 30th.

20 MR. SCHAUBLE: Very well, Your Honor.

21 JUDGE CHACHKIN: And the Bureau will have their
22 exhibits identified and offer them into evidence. And I
23 will listen to any objections. Now, I understand there's
24 going to be some expert witnesses the parties intend to
25 call. Mr. Shainis, you have some expert witnesses?

1 MR. SHAINIS: Yes, Your Honor.

2 JUDGE CHACHKIN: I'm just wondering if the parties
3 would, as I gather, the parties have not reduced the
4 testimony of the expert witness to writing, is that correct?
5 You intend to put them on orally? First you have to qualify
6 them, of course.

7 MR. SCHAUBLE: Yes.

8 JUDGE CHACHKIN: And the same with you, Mr.
9 Shainis, you don't intend to reduce it to writing? At least
10 up to now you haven't.

11 MR. SHAINIS: Your Honor, we intend to reduce, to
12 the extent possible, all of our witness testimonies to
13 writing.

14 JUDGE CHACHKIN: Well, I'm primarily interested in
15 the experts.

16 MR. SHAINIS: We intend to reduce the experts, as
17 well as all of our witnesses, to writing.

18 JUDGE CHACHKIN: Well, as far as the experts,
19 then, when will you serve the Bureau with their testimony?
20 Let me ask you, if you intend to reduce it to writing, when
21 do you intend to exchange your exhibits?

22 MR. SHAINIS: Well, Your Honor...

23 JUDGE CHACHKIN: You see, if you want to go forth
24 orally, there's no problem. But now you're telling me that
25 you want to reduce it to writing. That may present a

1 problem.

2 MR. SHAINIS: Well, Your Honor, we would, as soon
3 as we had a... Mr. Keller and I are leaving for California
4 this Thursday. One of the purposes of that trip is to
5 essentially draft, work with the witness in drafting the
6 testimony. I don't know, necessarily, if we'll be working
7 maybe what the expert at this trip, because the expert is
8 not based in California, as I recall. I would, if we put on
9 our case, for example, on December, well, January 11th, I
10 would think at least the day before any of our witnesses
11 would testify I would hand the Bureau their written
12 testimony to review, to prepare their cross examination.

13 JUDGE CHACKIN: I don't know if the Bureau feels
14 that's satisfactory, or not enough time.

15 MR. SCHAUBLE: Your Honor, one day prior, you
16 know, I don't think that gives sufficient time to, you know,
17 analyze a written exhibit...

18 MR. SHAINIS: Your Honor, that's more time than
19 they'd have if we produce the evidence orally.

20 JUDGE CHACKIN: I understand that. But orally,
21 they can make objections, it's, you know...

22 MR. SHAINIS: They can make objections to the
23 statement.

24 JUDGE CHACKIN: Who... you're telling me you
25 intend to reduce to writing all the witnesses' testimony?

1 MR. SHAINIS: To the extent that we can, Your
2 Honor. We just think it will make for a fuller and more
3 complete record, and I'd also, at this point, suggest that
4 maybe the Bureau would like to do the same thing, so that we
5 don't have to grapple around through, with direct testimony,
6 we can minimize it.

7 MR. SCHAUBLE: Your Honor, most of the Bureau is
8 not in a position to offer written testimony with respect to
9 most of its witnesses, because most of its witnesses are
10 either adverse witnesses or witnesses beyond the Bureau's
11 control.

12 JUDGE CHACHKIN: Well, I'm not going to require
13 the Bureau. In fact, I prefer a case in which there aren't
14 any written testimony, frankly, just oral testimony. I
15 think that's a more expeditious way of handling hearings, in
16 my judgment. But if Kay is going to put in written
17 exhibits, they're going to have to provide the Bureau with
18 more time than one day. And I'm not requiring Kay to put in
19 written testimony. If they just want to put on their
20 testimony orally, all they have to do is tell you who the
21 witnesses are and then proceed.

22 MR. SCHAUBLE: And they have provided us with a
23 witness list, Your Honor.

24 JUDGE CHACHKIN: And if there's any changes,
25 they'll have to tell you who the additional witnesses are.

1 How soon would you need the exhibits, if they're going to
2 provide you with, reduce it to writing; how soon would you,
3 in order to give you an opportunity to prepare for cross-
4 examination?

5 MR. SCHAUBLE: Your Honor, we think, you know,
6 particularly if it's going to be, you know, if we're going
7 to be in the middle of a hearing, we think a week before the
8 witness testifies would be reasonable.

9 JUDGE CHACHKIN: I think that's fair. I'm not
10 requiring you, Mr. Shainis, to offer any of your testimony
11 in writing. If you want to proceed orally, you can. But in
12 those cases where you're going to reduce it to writing, then
13 the Bureau should have the material by January 4th. So the
14 Bureau will at least have a week to prepare for cross
15 examination. But the choice is up to you. You don't have
16 to reduce any of it to writing if you don't want to.

17 Anything else the parties want to discuss?

18 MR. KELLER: And would that same one week time
19 apply to... did you say your expert testimony is going to be
20 in writing or not?

21 MR. KNOWLES-KELLETT: We anticipate, Your Honor,
22 that our experts will not be as much contentious as to
23 explain the intricacies... we intend to put on our expert
24 early on, one of our first witnesses, to just explain the
25 intricacies of a private land mobile operation, and how the

1 operation works, how the equipment works. Because our
2 experience is that this is a difficult area which not all of
3 us has a lot of experience in. And it's helpful... my
4 experience with the FCC has been six years in land mobile,
5 and he is helpful to me. So I think it would be better
6 taken orally. If you want it in writing, we'll do it.

7 JUDGE CHACHKIN: So, as I understand, the expert
8 witness, Mr. Shainis, is not going to testify concerning
9 whether Kay's practices are right.

10 MR. KNOWLES-KELLETT: Not all of... the vast
11 majority of his testimony will not do that.

12 MR. SCHAUBLE: There will be some of that, Your
13 Honor.

14 JUDGE CHACHKIN: Well, what is he going to testify
15 about? What? That the practice is, that Kay's practice,
16 keeping loading information is not somehow consistent with
17 practice, industry practice? What is he going to...

18 MR. KNOWLES-KELLETT: Probably more, the industry
19 understanding of what the FCC requires.

20 JUDGE CHACHKIN: Industry understanding?

21 MR. KNOWLES-KELLETT: Kay, but, both... it goes, I
22 think, to our notice that the FCC, the industry knew that we
23 needed these records to do our statutory spectrum regulatory
24 responsibilities.

25 JUDGE CHACHKIN: So you're telling me the FCC did

1 not put out any kind of rule making?

2 MR. KNOWLES-KELLETT: The FCC did. And he's going
3 to argue a state of mind...

4 JUDGE CHACHKIN: No, wait a minute. The FCC does
5 have, has put out something as to how you're supposed to
6 keep your records?

7 MR. KNOWLES-KELLETT: You're supposed to be able
8 to discern certain things from records kept in the ordinary
9 course of business. Previously, the records had to be
10 submitted every time they changed, and the FCC kept loading
11 cards, with all the customers on them. But in 1992 that
12 changed over to a system where you have, you're supposed to
13 keep customary business records such that the FCC could get
14 certain information.

15 JUDGE CHACHKIN: What rule is that?

16 MR. KNOWLES-KELLETT: I'm not sure of the cite.

17 MR. SCHAUBLE: But in response to your question,
18 Your Honor, the FCC does not tell anyone how to keep their
19 records. The methodology has never been articulated by the
20 FCC. And I don't think Mr. Kellett is suggesting that the
21 FCC's ever done that.

22 MR. KNOWLES-KELLETT: Well, there was some
23 guidance in this item that I'm talking about. It's called
24 the elimination of end user licensing. It's a 7 FCC record,
25 and the cite escapes me.

1 JUDGE CHACHKIN: Elimination of what?

2 MR. SCHAUBLE: End user licensing. That would
3 have been '93 sometime.

4 MR. KNOWLES-KELLETT: I think it was October '92.

5 JUDGE CHACHKIN: And this is 7 FCC something?

6 MR. KNOWLES-KELLETT: 7 FCC record.

7 MR. SCHAUBLE: It's cited in our trial brief.

8 JUDGE CHACHKIN: Oh, it is in the trial brief?

9 Then I'll look at it. OK.

10 MR. KNOWLES-KELLETT: So, basically, our expert
11 will be talking about the types of business records, and
12 maybe somewhat, that would satisfy this.

13 MR. KELLER: Your Honor, I guess we would suggest
14 that, to the extent there is a question about what the rules
15 require and what they don't require, that's a question of
16 law for Your Honor to decide, not a question of fact. If
17 they want to offer him as a fact witness to testify as to
18 what his understanding of industry practice is, I suppose
19 that's one thing. I have a little bit of concern about a
20 non-FCC witness testifying as to what the FCC regulations do
21 or don't require.

22 JUDGE CHACHKIN: Well, I think the best thing to
23 do in this case is to require all expert testimony be
24 reduced to writing. And when could you provide that to Mr.
25 Shainis? That way, whatever my ruling is, it will go

1 forward with the record. If the Commission disagrees with
2 me, at least it will be in the record.

3 MR. SCHAUBLE: December 14th.

4 MR. SHAINIS: Well, Your Honor, for the admissions
5 session, I would want to see that before the admissions
6 session. I may have some questions that would go to the
7 admissibility of that exhibit.

8 JUDGE CHACHKIN: Well, that may be. But, is it
9 possible to have it by November 30th? Well, that's not
10 going to leave you much time. I don't know how much time it
11 takes to... I mean, the admissions session we're talking
12 about is November 30th.

13 I'm prepared, if it's given on December 14th, when
14 the witness testifies, you'll still be able to voir dire
15 him, and qualify him. And if he's rejected, then it's, but
16 you'll have his testimony, his written testimony, by
17 December 14th. I think that would be... so, all right.
18 December 14th you'll supply the parties with his written
19 testimony. And Mr. Shainis, while I'm not requiring you to
20 put any of your testimony in writing, your expert witnesses'
21 testimony will be required to be in writing.

22 MR. SHAINIS: I understand that, Your Honor. And
23 when do you want, you want that exchanged by January 4th?

24 JUDGE CHACHKIN: Yes, that's the date that seems
25 sufficient to the parties. January 4th. And you'll get the

1 Bureau's expert testimony in writing on December 14th.

2 MR. SHAINIS: Your Honor...

3 JUDGE CHACHKIN: Yes.

4 MR. SHAINIS: ...on exhibits.

5 JUDGE CHACHKIN: Yes.

6 MR. SHAINIS: Except if it's official record,
7 there should be a sponsoring witness with each exhibit,
8 shouldn't there?

9 JUDGE CHACHKIN: Pardon me?

10 MR. SHAINIS: Except to the extent that it's
11 official Commission records, or something that public notice
12 can be taken, official notice can be taken, exhibits should
13 have a sponsoring witness, am I correct?

14 JUDGE CHACHKIN: Well, are you saying that comes
15 the admissions session, where they offer an exhibit in which
16 they intend to put on a sponsoring witness, that the ruling
17 should be reserved until the sponsoring witness testifies?
18 Is that what you're thinking of?

19 MR. SHAINIS: No.

20 JUDGE CHACHKIN: Then what do you have in mind?

21 MR. SHAINIS: If the Bureau comes up with an
22 exhibit, with no sponsoring witness, and it is neither
23 material that official notice can be taken of on a judicial
24 notice, I think the Bureau should be required to put on a
25 sponsoring witness. There should be some ability by Mr. Kay

1 to cross-examine on documents that are not official notice
2 type materials.

3 JUDGE CHACHKIN: Well, you've reviewed the
4 exhibits. Do you have in mind any particular exhibit?

5 MR. SHAINIS: Yes, Your Honor.

6 JUDGE CHACHKIN: All right. What type exhibit do
7 you have in mind?

8 MR. SHAINIS: There is a, there are numerous
9 documents that the Bureau has put in which are a compilation
10 relative to Mr. Kay's licenses. And I say compilation for
11 lack of a better word. These are documents that are not
12 normally available in the normal course. In fact, I think
13 they were specifically made using Commission records to
14 provide as an exhibit. I cannot get that type of document
15 if I go to the FCC. In other words, the Bureau had that
16 compiled. I have a right, I believe, to cross-examine the
17 person who made that document, to look at the materials that
18 were used to make that document.

19 MR. SCHAUBLE: Your Honor, to clarify...

20 MR. SHAINIS: That's just an example.

21 MR. SCHAUBLE: ...what Mr. Shainis is talking
22 about are official Commission records generated directly
23 from the Commission's master licensing database. These
24 records are merely a printout from the Commission's...

25 JUDGE CHACHKIN: But are you offering the exact

1 printout, or are you preparing a compendium of various data
2 in which you yourself have made an exhibit?

3 MR. SCHAUBLE: Your Honor, there is one exhibit
4 that falls into the, one or two exhibits, that falls into a
5 compendium. That's sort of a...

6 JUDGE CHACHKIN: Well, Mr. Shainis wants to
7 examine...

8 MR. SHAINIS: I would like to have a sponsoring
9 witness I can, to that, or I don't think it should be
10 admitted. But, Your Honor, I mean, I had my paralegal go to
11 the Commission asking for that type of information, and they
12 looked at him like he was out of his mind. 'We don't have
13 that.' That's not... that's something that the Bureau had
14 generated.

15 MR. SCHAUBLE: Your Honor, the vast majority of
16 the documents are ones that there was a printout directly
17 from the database.

18 JUDGE CHACHKIN: Well, then, we don't have any
19 problems with that. But the ones where you generated, using
20 various data, and you've come up with your own exhibit, Mr.
21 Shainis has said he wants to be able to... you have to have
22 a sponsoring witness for that. Mr. Shainis wants to cross-
23 examine that particular witness.

24 MR. SCHAUBLE: Your Honor, I think this would be a
25 matter to, we can discuss in more detail at the admission

1 session. I don't have the documents immediately here.

2 JUDGE CHACHKIN: All right. But Mr. Shainis is
3 putting you on notice, and I agree with him, that if you've
4 manufactured a document using various material from the
5 Commission's files, and someone has put it together and made
6 some kind of analysis, then Mr. Shainis has a right to
7 cross-examine that particular individual.

8 MR. SHAINIS: It's actually more fundamental than
9 that, Your Honor. There are documents in there that were,
10 for some reason the Bureau could not find Mr. Kay's license.
11 So rather than... in their exhibits with his license, I
12 don't have any problem with that. That's the official
13 license. But there are other documents that have been
14 generated by the Bureau based on the Commission's database.
15 The Commission's database is notorious for having incorrect
16 information. I don't know that it does in this instance, I
17 don't know that it doesn't. But I want to look at what was
18 used, and I want to know who did it. That's all.

19 JUDGE CHACHKIN: Well, it seems to me that's the
20 type of thing that it's possible for the parties to reach
21 some kind of stipulation about it. If we're dealing with
22 something taken from the Commission's database. So I would
23 suggest, Mr. Shainis, that you get together with Mr.
24 Schauble, see if you can work it out. Tell him what your
25 problems are.

1 MR. SHAINIS: Your Honor, I've had this discussion
2 with Mr. Schauble, informally. I don't think there's any
3 way to work it out.

4 JUDGE CHACHKIN: All right. Then Mr. Schauble, if
5 you have any such exhibits, Mr. Shainis is putting you on
6 notice he wants to be able to know who the sponsor is and
7 examine that individual.

8 MR. SCHAUBLE: Very well, Your Honor.

9 JUDGE CHACHKIN: Anything else? If not, we'll be
10 in recess until November 30th. Thank you very much.

11 MR. SCHAUBLE: Thank you, Your Honor.

12 MR. SHAINIS: Thank you, Your Honor.

13 (Whereupon, the hearing was adjourned.)

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REPORTER'S CERTIFICATE

FCC DOCKET NO.: WT 94-147
CASE TITLE: In Re: James A. Kay
HEARING DATE: November 16, 1998
LOCATION: Hearing

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.

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